Supreme Court, U.S.
FILED

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No. _____

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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JERRY LEE CARTER,

PETITIONER

vs.

TOBY BOWMAN and
COMMUNICATION SERVICES, INC.,

RESPONDENTS

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS**

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# PETITION FOR A WRIT OF CERTIORARI

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JERRY LEE CARTER, appearing pro se
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Abbeville, Alabama 36310-3104
334-585-6714

## QUESTIONS PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit erred in articulating the standard for determining whether the asserted nondiscriminatory reasons for the petitioner's termination were pretextual because its conflicted with relevant decisions of this Court?

The decision below conflicts with decisions of this Court holding that a plaintiff may prove a defendant violated Title VII of the Civil Rights Act of 1964, as amended, by demonstrating that discrimination was a motivating factor in the employment action at issue, with or without direct evidence.

## PARTIES TO THE PROCEEDING

JERRY LEE CARTER

TOBY BOWMAN

COMMUNICATION SERVICES, INC

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## OPINIONS

The opinion of the court of appeals appears at Appendix A to the petition and is reported at 2006 WL 531294 (11TH Cir. (Ala))

The opinion of the district court appears at Appendix B to the petition and is unpublished.

The recommendation of the Magistrate Judge of the district Court appears at Appendix C.

## INTRODUCTION

In *Ash et al., v. Tyson Foods, Inc.*, 126 S.Ct. 1195, (2006) this Court held that certain comments may be evidence of discrimination.

This Court unanimously held in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), that, at least in mixed-motives cases, a plaintiff may prove a defendant violated Title VII of the Civil Rights Act of 1964, as amended, by demonstrating that discrimination was a motivating factor in the employment action at issue, with or without direct evidence. In the months, since *Costa*, the lower federal courts have variously applied, ignored, and misinterpreted the Supreme Court's rather terse and unilluminating decision.

This Court's guidance on this fundamental questions raised by *Tyson Foods, Inc* and *Costa* is needed immediately.

## STATEMENT OF JURISDICTION

The Court of Appeals was entered its judgment on March 6, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

Mr. Carter was employed by Communication Services, Inc. with Toby Bowman as his supervisor and while at work he was struck by lightening. Mr. Carter asked that he be taken to the nearest medical facility; however,

Toby Bowman insisted that he be taken to a facility for drug testing. The facility in question was not the closest medical facility. Mr. Carter refused and was fired for violating company policy for refusing to take a drug test. Mr. Carter asserted that he did not refuse a drug test and would have taken a drug test at the facility to which he was eventually transported, however a test was not performed. Mr. Carter submitted that one month before he was terminated, Bowman commented that his brother must be a drug dealer because he was driving an expensive vehicle. Mr. Carter argued that this is direct evidence of discrimination. He submits that this direct evidence makes Communication Services, Inc.'s proffered explanation for his termination unworthy of belief. In addition, it was argued at District Court that other employees had suffered on the job injuries and was not required to submit to a drug test.

## ARGUMENT

***Whether the Court of Appeals erred in articulating the standard for determining whether reasons for the petitioner's termination were pretextual because its conflicted with relevant decisions of this Court?***

In *Ash et al., v. Tyson Foods, Inc.*, 126 S.Ct. 1195, 1197, (2006) this Court noted that "First, there was evidence that Tyson's plant manager, who made the disputed hiring decisions, had referred on some occasions to each of the petitioners as "boy." Petitioners argued this was evidence of discriminatory animus. The Court of Appeals disagreed, holding that "[w]hile the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination." Id., at 533 (citation omitted). Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous."

In this case, neither the District Court nor the Court of Appeals considered the statement made by Mr. Bowman concerning Mr. Carter's brother. Mr. Bowman who is Caucasian could have made the statement because of a bias that because a black male is driving an expensive automobile he must be dealing in drug. This bias was evident in Mr. Bowman's reaction when Mr. Carter was struck by lightening and requested to be taken to the nearest medical facility for treatment.

Mr. Carter submits that under *Tyson*, a hearing should be conducted to determine whether the statement of subsequent firing of Mr. Carter was evidence of racial animus.

Based on the above, Mr. Carter submits that the opinion of the Court of Appeals is in direct conflict with this Court's holding in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978) where this Court held that "that a prima facie case under McDonnell-Douglas is established where the plaintiff shows "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act. "

**Whether the decision below conflicts with decisions of this Court holding that a plaintiff may prove a defendant violated Title VII of the Civil Rights Act of 1964, as amended, by demonstrating that discrimination was a motivating factor in the employment action at issue, with or without direct evidence.**

On June 9, 2003, the U.S. Supreme Court unanimously held in *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), that, at least in mixed-motives cases, a plaintiff may prove a defendant violated Title VII of the Civil Rights Act of 1964, as amended, by demonstrating that discrimination was a motivating factor in the employment action at issue, with or without direct evidence. In the 22 months since Costa, the lower federal courts have variously applied, ignored, and misinterpreted the Supreme Court's rather terse and unilluminating decision. This has resulted no clear rules for proving, disproving, and trying federal employment discrimination cases.

As a result there appears to be confusion as to the rules regarding the following:

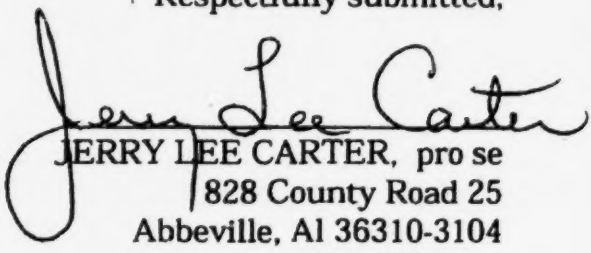
(1) The level of causation required to establish liability under Title VII.
(2) Whether the defendant had a single motive or mixed motives for taking the employment action at issue.
(3) Whether the defendant can prove it would have taken the same action even in the absence of an unlawful motive.

In *Costa*, this Court explicitly decided not to decide whether section 107 applies to all disparate treatment cases under Title VII, or just ones involving mixed motives.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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5-17-06

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 05-11536
Non-Argument Calendar

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MARCH 6, 2006
THOMAS K. KAHN
CLERK

D.C. Docket No. 04-00374-CV-F-S

JERRY LEE CARTER,

Plaintiff-Appellant,

versus

TOBY BOWMAN,
COMMUNICATION SERVICE, INC.,

Defendants-Appellees.

---

**Appeal from the United States District Court**
**for the Middle District of Alabama**

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(MARCH 6, 2006)

**ON PETITION FOR REHEARING**

Before ANDERSON, BIRCH and WILSON, Circuit Judges.

PER CURIAM:

We vacate our prior opinion in this case filed on December 9, 2005, and substitute in its place the following opinion. [1]

Jerry Lee Carter appeals pro se the district court's grant of summary judgment to the defendants, Toby Bowman and Communications Services, Inc. (collectively, "CSI"), on his civil action alleging disparate treatment on the basis of race pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. We affirm.

Carter worked for CSI installing cable and telephone lines. When he began his employment, Carter was informed of and agreed to abide by CSI's substance abuse policy, which required all employees who reported an on-the-job injury to submit to a drug test. Carter acknowledged that his employment was conditioned upon his willingness to submit to drug testing, and that if he failed to submit to or cooperate with any such testing, this would result in disciplinary action including termination.

Carter was struck by lightning while working for CSI. He immediately reported the accident to CSI and was taken to an occupational health clinic. At the clinic, he was told he needed to take a drug test pursuant to CSI's substance abuse policy. Carter was informed that if he failed to submit to a drug test, he would jeopardize his employment. Carter left the clinic without taking a drug test and went to an emergency room instead. Carter never took a drug test at the emergency room, nor was he was treated at the emergency room.

The following day, CSI terminated Carter's employment pursuant to the policy because it believed he refused to submit to a drug test. In his complaint, Carter alleged that he was discriminated against because similarly-situated employees outside his protected class

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[1] The petition for rehearing is granted

were not required to submit to drug testing after reporting work-related injuries.

On appeal, Carter argues there are facts in dispute that merit the denial of summary judgment. Carter argues that, despite Bowman's statement to the contrary, he never refused to take a drug test. He explains he did not take a drug test in a reasonable time after the accident because he was terminated the day after his accident. Furthermore, Carter submits that one month before he was terminated, Bowman commented that Carter's brother must be a drug dealer because he was driving an expensive vehicle. Carter argues that this is direct evidence of discrimination. He submits that this direct evidence makes CSI's proffered explanation for his termination unworthy of belief, and therefore, he does not need any more evidence to prove discrimination.

"We review a grant of summary judgment de novo, using the same legal standard as the district court." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1184 (11th Cir.1997). Summary judgment is proper if the pleadings, depositions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). "There is a genuine issue of material fact if the nonmoving party has produced evidence such that a reasonable factfinder could return a verdict in its favor." Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1279 (11th Cir.2001). The evidence, and all inferences drawn from the facts, must be viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The non-moving party must make a sufficient showing on each essential element of the case for which he has the burden of proof. Celotex Corp., 477 U.S. at 323, 106 S.Ct. at 2552.

Title VII prohibits discrimination on the basis of race color, religion, sex or national origin in various employment practices. 42 U.S.C. § 2000e-2; Bass v. Bd. of County Comm'rs, Orange County, Fla., 256 F.3d 1095, 1103 (11th Cir.2001). Plaintiffs bear the burden of proving the employer's unlawful discrimination. Hinson v. Clinch County, Ga. Bd. of Educ., 231 F.3d 821, 827 (11th Cir.2000). A plaintiff may establish a claim through the introduction of direct evidence or circumstantial evidence that creates an inference of discrimination. Id. For direct evidence, "[o]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of race constitute direct evidence of discrimination." Bass, 256 F.3d at 1105 (internal quotations omitted). In reviewing circumstantial evidence, we use the McDonnell Douglas/Burdine framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Under this framework, the plaintiff must first establish "a prima facie case of discrimination, which creates a rebuttable presumption that the employer acted illegally." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004). The employer then bears the burden to show a legitimate and non-discriminatory reason for the employment action. Id. If this burden is met, then the presumption is rebutted and the burden shifts back to the plaintiff to show the proffered reason was a pretext for discrimination. Id.

To establish a prima facie case for wrongful termination, the plaintiff must prove that (1) he belongs to a protected class, (2) he was subject to an adverse employment action, (3) the employer treated similarly-situated employees outside his protected class more favorably, and (4) he was qualified for the job. Id. at 1091 (citations omitted). To make a comparison to similarly-situated employees, the plaintiff must show he is similarly-situated in all relevant respects to those

employees. Id. Furthermore, it is necessary to consider whether they are involved in or accused of similar conduct and disciplined in different ways. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir.1997) (per curiam).

Here, Carter argues that Bowman's comment regarding Carter's brother constituted direct evidence of discrimination. However, Carter did not make this argument in his response to CSI's motion for summary judgment, his supplement to his response, or in his objection to the magistrate's recommendations. Carter merely discussed the comment in his objection, but he did not argue that it was direct evidence of discrimination. Arguments "not raised in the district court and raised for the first time in an appeal will not be considered by this court." Access Now, Inc. v. Southwest Airlines Co., 385 F.3d 1324, 1331 (11th Cir.2004) (citations omitted).

Using the McDonnell Douglas/ Burdine framework for establishing circumstantial evidence of discrimination, Carter satisfied the first three prongs of the prima facie case. He belongs to a protected class and he was subjected to an adverse employment action when he was terminated. As to the third prong, Carter must establish that CSI treated similarly-situated white employees more favorably. Viewing the facts most favorable to Carter, a reasonable person could find there were three employees who were injured on-the-job, who reported the injury soon thereafter, and were not required or asked to take a drug test. Therefore, in analyzing the arguments as Carter framed the case, he raised a question of fact as to his prima facie case.

However, CSI offered a legitimate, ondiscriminatory reason for Carter's termination, namely, his refusal to submit to the required drug test after Carter reported his on-the-job injury. Carter offered insufficient evidence to indicate that CSI's proferred reason for terminating him was a pretext for discrimination. Although Carter disputes that he refused to submit to the drug test, he did

not present any evidence that he submitted to a drug test at any time after the incident. Consequently, Carter failed to rebut CSI's assertion that he was terminated for refusing to submit to a drug test.

Accordingly, the district court properly granted summary judgment to CSI.

Subsequent to our original review of this appeal, Carter filed a petition for rehearing. In his petition for rehearing, Carter argued that he did take a drug test at the emergency room. He submitted new evidence for us to review that the district court never had the opportunity to examine and that is not a part of the district court record. This new evidence consists of copies of Carter's emergency room medical record, which indicates that he visited the emergency room on the day of the accident, and that the medical staff were going to "check on need for drug and alcohol testing." Whether Carter actually did submit to a drug test at the emergency room is a factual question, which we will not review on appeal. Our precedent is clear:

> [A]n issue not raised in the district court and raised for the first time in an appeal will not be considered by this court. The reason for this prohibition is plain: as a court of appeals, we review claims of judicial
> error in the trial courts. If we were to regularly address questions— particularly fact-bound issues--that district courts never had a chance to examine, we would not only waste our resources, but also deviate
> from the essential nature, purpose, and competence of an appellate court. See *Access Now, Inc.*, 385 F.3d at 1331 (internal citations omitted).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA OF
SOUTHERN DIVISION

| | | |
|---|---|---|
| JERRY LEE CARTER, | * | |
| | * | |
| Plaintiff, | * | |
| | * | |
| v. | * | CASE NO. 1:04-cv 374-F |
| | * | |
| TOBY BOWMAN, *et al*, | * | |
| | * | |
| Defendants | * | |

**AMENDED ORDER**

After an independent review of the file, it is the ORDER, JUDGMENT and DECREE of the court that:

(1) The plaintiffs objection (Doc. #64) to the Recommendation of the Magistrate Judge (Doc. #63) filed on February 18, 2005 is overruled;

(2) The Recommendation of the Magistrate Judge entered on February 7, 2005 is adopted;

(3) The defendants' motion for summary judgment (Doc. #12) is GRANTED and that this case is DISMISSED with prejudice.

(4) Costs of this proceeding are taxed against the plaintiff.

DONE this 1st day of March, 2005.

/s/Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA OF
SOUTHERN DIVISION

| | | |
|---|---|---|
| JERRY LEE CARTER, | * | |
| | * | |
| Plaintiff, | * | |
| | * | |
| v. | * | CASE NO. 1:04-cv-374-F |
| | * | |
| TOBY BOWMAN, *et al,* | * | |
| | * | |
| Defendants | * | |

## ORDER

After an independent review of the file, it is the ORDER, JUDGMENT and DECREE of the court that:

(1) The plaintiffs objection (Doc. #64) to the Recommendation of the Magistrate Judge (Doc. #63) filed on February 18, 2005 is overruled;

(2) The Recommendation of the Magistrate Judge entered on February 7, 2005 is adopted;

(3) The defendants' motion for summary judgment (Doc. #12) is GRANTED and that this case is DISMISSED with prejudice.

(4) Costs of this proceeding are taxed against the plaintiff. DONE this 1st day of February, 2005.

/s/Mark E. Fuller
CHIEF UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA OF
SOUTHERN DIVISION

| | | |
|---|---|---|
| JERRY LEE CARTER, | * | |
| | * | |
| Plaintiff, | * | |
| | * | |
| v. | * | CASE NO. 1:04-cv-374-F |
| | * | |
| TOBY BOWMAN, *et al,* | * | |
| | * | |
| Defendants | * | |

**FINAL JUDGMENT**

Upon consideration of the prior proceedings, opinions and orders entered in this case, it is ORDERED and ADJUDGED that judgment is entered in favor of the defendants and against the plaintiff, that this action is dismissed with prejudice, and costs are taxed against the plaintiff.

DONE this 1st of March, 2005

/s/Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

JERRY LEE CARTER, *
*
Plaintiff, *
*
v. CIVIL ACTION NO. 1:04cv374-F
*
COMMUNICATIONS SERVICES, INC.,
etal, *

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**RECOMMENDATION OF THE MAGISTRATE JUDGE**

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## I. INTRODUCTION

The pro se plaintiff, Jerry Lee Carter, a former employee of Communications Services, Inc., ("CSI") brings this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), alleging that he was discriminated against on the basis of his race (African-American) when he was terminated from his employment for refusing to submit to a drug test. Carter names CSI and Toby Bowman ("Bowman"), a supervisor, as defendants.

This court has jurisdiction of the plaintiffs discrimination claim pursuant to the jurisdictional grant in 42 U.S.C. § 2000e-5. Now pending before the court is the defendants' motion for summary judgment. The court has carefully reviewed the motion for summary judgment, the briefs filed in support of and in opposition to the motion, and

the supporting and opposing evidentiary materials and concludes that the motion is due to be granted.

## II. SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." This standard can be met by the movant, in a case in which the ultimate burden of persuasion at trial rests on the nonmovant, either by submitting affirmative evidence negating an essential element of the nonmovant's claim, or by demonstrating that the nonmovant's evidence itself is insufficient to establish an essential element of his or her claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Jeffery v Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (11th Cir. 1995); *Edwards v. Wallace Cmty Coll.*, 49 F.3d 1517, 1521 (11th Cir. 1995).

The burden then shifts to the nonmovant to make a showing sufficient to establish the existence of an essential element of his claims, and on which he bears the burden of proof at trial. Id. To satisfy this burden, the nonmovant cannot rest on the pleadings, but must, by affidavit or other means, set forth specific facts showing that there is a genuine issue for trial. FED. R. Civ. P. 56(e).

> The court's function in deciding a motion for summary judgment is to determine whether there exist genuine, material issues of fact to be tried; and if not, whether the movant is entitled to judgment as a matter of law. See *Dominickv. Dixie Nat'I Life Ins. Co.*, 809 F.2d 1559 (11th Cir. 1987). It is substantive law that identifies those facts which are material on motions for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258

(1986); See also *Belong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir.1989).

When the court considers a motion for summary judgment, it must refrain from deciding any material factual issues. All the evidence and the inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Barley v. ChampionInt'I Corp.*, 907F.2d 1077,1080(11th Cir. *1990).See MatsushitaElee. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,587 (1986). The movant bears "the exacting burden of demonstrating that there is no dispute as to any material fact in the case." *Warrior Tombigbee Transp. Co. v. M/VNanFung*, 695 F.2d 1294, 1296 (11th Cir. 1983).[1]

## III. FACTS'

Carter began installing cable and telephone lines for CSI, a communications company, and was advised of CSI's drug abuse policy in December 2002. CSI generally required all employees who reported an on-the-job injury to submit to a drug test. (Affid. of Marty Whitener at 3.) In addition, CSI's written drug policy provided that "[a]ny employee who reports to work under the influence of illegal drugs or alcohol or who is suspected of being impaired while on the job will be asked to take an alcohol/drug test." (Defs' Ex. A at 1.) Carter signed an acknowledgment indicating that he understood that "[his] employment with the company is conditioned] upon [his] willingness to submit to and the results of periodic drug and alcohol testing required by the company" and that if he "refuse[d] to submit to or cooperate with any such testing, this will result in disciplinary action against [him] including termination of [his] employment with CSI." (Defs' Ex. B.) In Carter's case, the seemingly mundane tasks of signing paperwork and installing telephone lines for CSI were merely the calm before the storm.

While installing telephone lines on June 31, 2003, Carter was struck by lightning. After this shocking incident, Carter told David Gomez, another employee, that a lightning bolt had struck him. Carter borrowed Gomez's phone and contacted Bowman, his supervisor.

[1] On a motion for summary judgment, the court must construe the facts in the light most favorable to the non-movant who, in this case, is the plaintiff. *See, e.g., Brown v. Crawford*, 906 F.2d 667 (11th Cir. 1990).

Shortly after their conversation, Bowman arrived on the scene and told Carter that he did not believe that he had been struck by lightning. Although Carter asked Bowman to drive him to the emergency room, Bowman transported Carter to the occupational health clinic.

While completing Worker's Compensation paperwork at the clinic, Carter was informed that he would be required to take a drug test. When Carter told Bowman that he did not wish to participate in drug testing, Bowman advised him that refusing the test would jeopardize his employment. In fear of his life, Carter told Bowman that he was going to the hospital emergency room and left the clinic. (Pi's Resp. at 2.) At some point, Carter contacted Marty Whitener, a CSI manager, and advised him that he could not take the drug test because he needed to go to the hospital. *(Id)*

The next morning, Carter called Bowman. When Carter told Bowman that he would not be going into work that day, Bowman informed Carter that his employment was terminated because he refused to take a drug test. At some point, Carter went to CSI and Bowman gave Carter a draft of a "letter of termination." (Doc. # 55 at 2.) When Carter refused to sign the document, sparks began to fly and Bowman "snatched... back" the letter. *(Id.)*

Upon his termination, Carter informed the Equal Employment Opportunity Commission ("EEOC") of his belief that he was unlawfully terminated. On March 9, 2004, the EEOC dismissed the charges against CSI and notified Carter of

his right to file a federal lawsuit. The plaintiff filed this action on June 14, 2004.

## IV. DISCUSSION

Carter claims that he was terminated from his position as a helper for CSI on the basis of his race. Specifically, Carter alleges that, although his supervisor informed him that he was fired for refusing to take a drug test, several Caucasian employees were not required to submit to drug testing after reporting work-related injuries.

Title VII prohibits discrimination on the basis of race, color, religious, sex, or national origin in a variety of employment practices. *See Walker v. NationsBank ofFla., N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995). In an employment discrimination case, the plaintiff bears the ultimate burden of proving intentional discrimination. *Texas Dept. ofCmty Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To defeat the defendants' motion for summary judgment, Carter must establish a prima facie case of discrimination by one of three generally accepted methods: (1) presenting direct evidence of discriminatory intent; (2) presenting evidence to satisfy the four-part circumstantial evidence test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); or (3) presenting statistical proof. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). Because Carter has not presented the court with any direct evidence of discriminatory intent or statistical proof, the court analyzes his discrimination claims within the *McDonnell Douglas* framework. *See Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1184 (11th Cir. 1984).

In an employment discrimination case, the plaintiff must prove that the defendant intentionally discriminated against him. *Burdine*, 450 U.S. at 253. This Circuit has consistently held that federal courts, in resolving discrimination claims, do not review the accuracy

of an employer's decision. *See, e.g., Jones v. Bessemer Carraway Med. Ctr.*, 151 F.3d 1321, n. 16 (11th Cir. 1998) ("Title VII is not a shield against harsh treatment in the workplace.... The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."). To be successful, the plaintiff must prove a prima facie case of discrimination by a preponderance of the evidence. *Burdine*, 450 U.S. at 252-53.

The court construes Carter's claim that he was treated differently from other employees as a disparate treatment claim. To establish a prima facie case of disparate treatment under Title VII, Carter must show that there were employees, not within his protected class, who were similarly situated, but who were treated more favorably. *See Walker v. Mortham*, 158 F.3d

1177,1193 (11th Cir. 1998); *Holifleldv. Reno*, 115 F.3d 1555,1561 (11th Cir. 1997). The question of whether the plaintiff is similarly situated with non-minority employees is crucial. *See Marshall v. Western Grain Co., Inc.*, 838 F.2d 1165,1168 (11th Cir. 1988) *(citing KendalI v. Block*, 821 F.2d 1142 (5th Cir. 1987)). If the plaintiff establishes a prima facie case, the defendant must then articulate a legitimate, nondiscriminatory reason for its actions. *See Holifleldv. Reno*, 115 F.3d at 1564; *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d at 1184. If such a reason is produced, a plaintiff then has the ultimate burden of proving that the defendant's articulated reason is a pretext for discrimination. *Id.*

In his complaint and responses, Carter alleges that he is similarly situated with several employees who were not required to submit to drug testing. (Doc. # 1 at 2; Doc. # 55 at 2; Doc. # 62 at 1.) Specifically, Carter alleges that CSI did not require Bowman, Jerry McDonald, Johnny Spann, Jim Lott, Marcus Glasgow, Chris Caraway, Billy Weaver, Kenny Weaver or Jimmy Rich to undergo drug testing after

reporting their on-the-job injuries. Although Carter alleges that these employees did not receive a drug test, Carter does not point to any evidence demonstrating that these employees *refused to* submit to drug testing within a reasonable time after the incident occurred. The court therefore concludes that Carter has failed to show that he was similarly situated with these employees.[2] Moreover, CSI has articulated a legitimate, nondiscriminatory reason for terminating Carter.

Specifically, CSI asserts that Carter was terminated for refusing to take a drug test after the injury occurred. Although Carter alleges that he told a manager that he intended to go to the hospital and that he would not refuse a drug test, he has presented no evidence indicating that he was hospitalized or that he received a drug test within a reasonable time after the incident, and, more importantly, Carter has offered no evidence indicating that the defendants' proffered reason for firing him is a pretext for discrimination. Consequently, Carter has failed to rebut

the defendants' assertion that he was terminated for refusing to take a drug test. In light of the foregoing, the court concludes that the defendants are entitled to summary judgment.

[2] The court also notes that, in addition to determining that Carter has failed to show that these employees refused to submit to drug testing within a reasonable time after their on-the-job injuries, the court also concludes that Carter has failed to demonstrate that he was similarly situated with these employees for several other reasons. For instance, Carter's pleadings and evidentiary materials indicate that Marcus Glasgow, Anthony Hurst, Kenny Weaver, and Jimmy Rich received on-the-job injuries several months after Carter was terminated from his employment at CSI.

In addition, although Carter alleges that he "remember[s] that Spann had an on the job injury in which he hurt his left knew *[sic]*, but Defendants failed to provide this data." (doc. # 55 at 2), there are no records of Johnny Spann receiving any injuries during his employment at CSI. The burden is on Carter to make a showing sufficient to establish the existence of an essential element of his discrimination claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); FED. R. CIV. P. 56(e).

It is also worth noting that, although Carter alleges that CSI did not require Jim Lott to take a drug test after he injured his hand, the defendants assert that Lott was not required to submit to a drug test because he is a private contractor. The defendants also maintain that CSI was aware of only one injury suffered by Lott, which occurred at his residence. As previously discussed, CSI's policy requires all of its employees to submit to drug testing after receiving an on-the-job injury. Carter has failed to point to any evidence demonstrating that Lott was an employee who suffered an on-the-job injury.

Furthermore, as support for his allegation that he was treated differently from Bowman, Carter submits an accident report indicating that Toby Bowman was involved in a car accident during his employment at CSI. This report does not demonstrate that Bowman suffered any on-the-job injury as a result of the accident or that he reported his injuries to CSI. Consequently, Carter has failed to demonstrate that he and these employees were similarly situated.

## V. CONCLUSION

Accordingly, it is the RECOMMENDATION of the Magistrate Judge that the defendants' motion for summary judgment (doc. # 12) be GRANTED and that this case be DISMISSED with prejudice.

It is further the RECOMMENDATION of the Magistrate Judge that the costs of this proceeding be taxed against the plaintiff. It is further ORDERED that the parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing or transmittal to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a *de novo* determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted

or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Banner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 7th day of February, 2005.

/s/Charles S. Coody
CHARLES S. GOODY,
CHIEF UNITED STATES MAGISTRATE JUDGE

(1)

No. 05-1506

Supreme Court, U.S.
FILED
JUN 20 2006
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

JERRY LEE CARTER,

*Petitioner,*

v.

TOBY BOWMAN and
COMMUNICATIONS SERVICES, INC.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

1. Whether Petitioner has presented any compelling reasons to grant the Petition where the Eleventh Circuit's opinion affirming summary judgment in favor of Respondents does not conflict with any decisions of this Court and does not implicate an important federal question that has not previously been decided?

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Communications Services, Inc. does not have a parent company and is not publicly traded.

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## INTRODUCTION

Petitioner is required to present "compelling reasons" to justify the granting of his Petition for Writ of Certiorari. *See* Sup. Ct. Rule 10. Petitioner has failed to present any compelling reasons for issuance of the writ. Furthermore, his arguments in support of granting the writ are based upon misstatements of the record, the applicable law, and the decision below. (*See* Pet. Cert. at 5-6.) The Eleventh Circuit's opinion at issue neither conflicts with any decisions of this Court, or of any other Court of Appeal, on any important issue; nor decides or implicates any previously undecided important point of law. *See* Sup. Ct. Rule 10(a)-(c).

## STATEMENT OF THE CASE

Petitioner Carter was hired by Respondent Communications Services, Inc. ("CSI") in December 2002. (Pet. App. at A2.) When Carter applied for employment with CSI, he received a copy of CSI's Substance Abuse Policy which requires drug testing for employees involved in Worker's Compensation injuries requiring medical treatment. (Pet. App. at A12.) The policy further provides, and Carter signed an acknowledgement that, employees refusing to take the alcohol/drug test, **or who fail to cooperate or participate in these procedures**, will be subject to discipline up to and including termination. (Pet. App. at A12.)

On July 31, 2003, Carter claims he was struck by lightning while he was working with another CSI employee, David Gomez. (Pet. App. at A13.) Gomez allowed Carter to use his CSI business phone to contact family

members and his supervisor, Respondent Toby Bowman. (Pet. App. at A13.) Despite having access to the telephone, Carter did not call 911. (Pet. App. at A13.)

When Bowman learned that Carter claimed to have been struck by lightning, because it was a work-related injury, he arranged to have Carter transported to a nearby occupational health clinic for medical treatment. (Pet. App. at A2.) As the paperwork was being completed, Carter was notified that he was required to take a drug test as part of the Worker's Compensation claim. (Pet. App. at A2.) Carter did not cooperate by submitting to the drug test and instead insisted he be taken to a hospital emergency room. (Pet. App. at A2.) Carter was informed that refusing the drug test was jeopardizing his employment. (Pet. App. at A2.) Nonetheless, Carter continued in his refusal and/or failure to cooperate in submitting to the drug test and left the facility without submitting to the test. (Pet. App. at A2.) Although Carter disputes that he "refused" to take the drug test, he never submitted any evidence showing that he submitted to a drug test. (Pet. App. at A5-6.)

The following day, Carter was informed that his employment was terminated because he failed and/or refused to cooperate in taking the drug test in violation of Respondent's Substance Abuse policy. (Pet. App. at A2.) Notably, although Bowman notified Carter that his employment was terminated, the **decision** to terminate Carter's employment was made by Bowman's supervisor, Marty Whitener. Doc. 57, Ex. 2, Whitener Supp. Aff. at 8.

Carter failed to present any evidence that any other employee of CSI ever refused to take a drug test. (Pet. App. at A16.) He further failed to present any evidence

that the reason given by CSI for his termination was a pretext for race discrimination. (Pet. App. at A5-6.)

## REASONS FOR DENYING THE PETITION

This is a simple case where an employee was terminated, pursuant to a policy of which he had notice, due to his refusal and/or failure to submit to a drug test after an alleged worker's compensation injury. Petitioner claims that the termination of his employment was the product of race discrimination rather than his failure to submit to a drug test. The undisputed facts show that Petitioner left the medical facility to which he was taken for treatment without submitting to a drug test, and he failed to present any evidence that he ever submitted to a drug test.

The Eleventh Circuit affirmed summary judgment in Respondents' favor because Petitioner failed to establish that the reason articulated by Respondent CSI for Petitioner's termination was a pretext for race discrimination. (Pet. App. at A5-6.)[1] The Court of Appeals also refused to consider Petitioner's argument that he had established direct evidence of discrimination because Petitioner had failed to make that argument before the District Court. (Pet. App. at A5-6.)

Petitioner wrongly asserts that Certiorari review is warranted because the Eleventh Circuit's decision below

[1] The judgment in favor of Respondent Bowman should not be disturbed because there is no individual liability under Title VII. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991).

conflicts with three decisions of this Court. There are no such conflicts.

1. Petitioner first argues that the Eleventh Circuit's decision in this case conflicts with this Court's decision in *Ash, et al. v. Tyson Foods, Inc.*, 126 S.Ct. 1195 (2006). (*See* Pet. Cert. at 5-6.) There is no conflict between these decisions. In *Ash*, the Court of Appeals' holding that the term "boy" alone was not evidence of racial animus was reversed. 126 S.Ct. at 197. This Court held that the term "boy" may, in some circumstances, constitute evidence of a discriminatory intent. *Id.* In this case, the comment at issue is alleged to have been made by Bowman, who was not the decision maker, about a month before and unrelated to Respondent's termination. (Pet. App. at A3.) The alleged comment by Bowman stated something to the effect that Petitioner's brother must be a drug dealer because he was driving a nice car. (Pet. App. at A3.) The Eleventh Circuit below did not hold that this alleged comment could not be evidence of racial animus. (Pet. App. at A5.) Rather, the Eleventh Circuit refused to consider Petitioner's argument that this comment was direct evidence of discrimination because that argument had not been raised before the District Court. (Pet. App. at A5.) *Ash* is further distinguishable because, in this case, the alleged racist comment was not made by the decision maker. Thus, rather than presenting a conflict with *Ash*, the law established in *Ash* is not even applicable to the Eleventh Circuit's decision in this case.

2. Similarly, Petitioner briefly claims that the Eleventh Circuit's decision in this case conflicts with this Court's decision in *Furnco Const. Corp. v. Waters*, 438 U.S. 567 (1978). (*See* Pet. Cert. at 6.) Petitioner's argument in this regard consists solely of a recitation of one quote from

*Furnco* inferring discrimination from otherwise "unexplained" actions. (*See* Pet. Cert. at 6.) However, contrary to Petitioner's implication, in this case, there are no "unexplained" actions from which one could infer race discrimination. Respondent CSI explained the reason for Petitioner's termination: he refused to submit to a drug test after suffering a worker's compensation injury requiring medical treatment. The facts on which Respondent CSI based its termination decision are **undisputed**, not unexplained. (Pet. App. at A5-6.) Therefore, there is no conflict with *Furnco*.

3. Finally, Petitioner claims that the Eleventh Circuit's decision in this case conflicts with this Court's opinion in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). (*See* Pet. Cert. at 6.) This assertion is also without merit. The issue in *Desert Palace* was "whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive jury instruction." 539 U.S. at 98. The Court answered this question in the negative. *Id.* at 101-02. No part of the decision changed the analysis applicable to cases on summary judgment. *Id.*; *see also Hoag v. Arkansas State Highway Transp. Dept.*, Slip Copy, 2006 WL 1133581 (8th Cir. 2006). Because the Eleventh Circuit below was not addressing whether a mixed motive defense and/or instruction was appropriate in this case, *Desert Palace* has no application here. Because *Desert Palace* does not apply, there is no conflict with that decision, and any further clarification of *Desert Palace* will not affect this case.

## CONCLUSION

In conclusion, Petitioner has failed to carry his burden of demonstrating that there are "compelling reasons" for this court to grant his Petition. Therefore, his Petition should be denied.

Respectfully submitted,

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